NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1). 2013 IL App (4th) 120512-U

NO. 4-12-0512

IN THE APPELLATE COURT

FILED
October 28, 2013
Carla Bender
4th District Appellate
Court, IL

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
ROBERT HEARN,)	No. 03CF569
Defendant-Appellant.)	
)	Honorable
)	Leslie J. Graves,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court. Presiding Justice Steigmann and Justice Pope concurred in the judgment.

ORDER

- ¶ 1 Held: We grant the office of the State Appellate Defender's motion to withdraw as appellate counsel pursuant to Pennsylvania v. Finley, 481 U.S. 551 (1987), and affirm the trial court's dismissal of defendant's petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)).
- ¶ 2 This appeal comes to us on the motion of the office of the State Appellate

 Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be
 raised in this case. For the following reasons, we agree and affirm.
- ¶ 3 I. BACKGROUND
- ¶ 4 In July 2003, the State charged defendant, Robert Hearn, with manufacture or delivery of cocaine, a controlled substance (720 ILCS 570/401(d) (West 2002)).
- ¶ 5 On December 8, 2003, the trial court held a guilty plea hearing. The State

informed the court the plea was negotiated for a sentence of 3 to 14 years' imprisonment.

According to the factual basis, on March 12, 2003, Springfield police officers served a search warrant on a residence in Springfield. The search revealed crack cocaine in the house and \$1,800 in defendant's pocket. Included in the currency in defendant's pocket was "buy money" previously advanced to a confidential informant by police investigators. Prior to the execution of the search warrant, the confidential informant used the "buy money" to make a controlled buy at the Springfield residence. During the plea hearing, the court admonished defendant as follows:

"THE COURT: Do you understand that by waiving all these rights and pleading guilty, you are, in fact, admitting to this Court you're guilty of these charges and there will never in the future be a hearing as to the issue of guilt or innocence? Do you understand that?

[DEFENDANT]: Yes."

The same day, the court sentenced defendant to four years' imprisonment. Defendant did not file any posttrial motions or a direct appeal.

On April 21, 2010, over six years later, defendant filed a "Pro Se Petition For Writ of Error Coram Nobis, *and/or* ANY OTHER APPLICABLE RULE/STATUTE PERTAINING TO ACTUAL INNOCENCE CLAIM." Defendant asserted he was innocent as his cousin, Jesse Knighton, sold the cocaine to a confidential informant and exchanged "buy money" for a \$50 bill from defendant. Defendant stated he had tried to bring this to the attention of his counsel in a federal criminal prosecution that resulted in a prison sentence of 360 months. Defendant explained (1) he "did not seek appellate review of his conviction because he was then

manipulating the system in an effort to protect his cousin" and (2) "[i]t was due to the seriousness of the circumstances pertaining to the present federal sentence and the attendant career offender enhancement, which has prompted discussions with his cousin Jesse[] Knighton which have led, reluctantly led to the presentations of the truth as they pertain to the facts of this case." The petition included an affidavit from Knighton and defendant.

- ¶ 7 On January 17, 2012, the State filed a motion to dismiss defendant's petition. The State asserted the petition should be treated as a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). The State argued the petition was untimely and did not allege facts unknown to defendant at the time judgment was entered.
- On April 23, 2012, defendant filed a response to the State's motion to dismiss.

 Defendant asserted the State perpetrated a fraud because it knew (1) he did not sell cocaine to the confidential informant and (2) "that [defendant] was taken [(sic)] the rap for his cousin and he was not guilty of the charged offense." Defendant explained his "presence at the crack-house was because of his own addiction to crack and use thereof, not for making sales" and he was in the house "smoking crack, not selling crack" on the day of the search. Defendant also asserted he was under duress because "once he made that decision [(to plead guilty for his cousin),] he could not deviate from that course of action because of fear of retaliation/death." Defendant posited these reasons tolled the statute of limitations.
- ¶ 9 On May 24, 2012, the trial court, by written order, dismissed defendant's petition. The court treated the petition as a section 2-1401 petition and found it was not timely filed. The court found defendant had not presented errors of fact unknown to him that would have

prevented judgment being entered against him.

- ¶ 10 On March 26, 2013, OSAD moved to withdraw as appellate counsel, including in its motion a brief in conformity with the requirements of *Finley*. The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by May 1, 2013. Defendant did not do so. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.
- ¶ 11 II. ANALYSIS
- ¶ 12 OSAD argues defendant's petition presents no meritorious issues. Specifically, OSAD asserts (1) the petition was untimely and (2) he did not assert facts unknown at the time of the plea. We agree.
- ¶ 13 A. Standard of Review
- Section 2-1401 of the Code of Civil Procedure (Code) abolished the writ of error *coram nobis* and allows for relief from final judgments more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2010). Section 2-1401(c) of the Code provides a petition must be filed within two years after entry of the order or judgment, and "[t]ime during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years." 735 ILCS 5/2-1401(c) (West 2010). "
 'Relief under section 2-1401 is predicated upon proof, by a preponderance of [the] evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in discovering the defense or claim and presenting the petition.' " *People v. Lee*, 2012 IL App (4th) 110403, ¶ 15, 979 N.E.2d 992 (quoting *People v. Vincent*, 226 Ill. 2d 1, 7-8, 871

N.E.2d 17, 22 (2007)). "To be entitled to relief under section 2-1401, the petitioner must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition." *Id.* "This court reviews a circuit court's dismissal of a section 2-1401 petition for an abuse of discretion." *Id.*

- ¶ 15 B. Untimeliness of Defendant's Petition
- ¶ 16 Defendant filed the instant section 2-1401 petition on April 21, 2010, over six years after his December 8, 2003, plea of guilty. His petition is beyond the two-year statute of limitations for section 2-1401 petitions.
- Pefendant asserts the statute of limitations should be tolled because the State concealed its knowledge that he did not sell the drugs to the confidential informant. "Under the fraudulent concealment exception to section 2-1401's two-year period of limitations, the defendant must allege facts demonstrating his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief and must offer factual allegations demonstrating his good faith and reasonable diligence in trying to uncover such matters before trial or within the limitations period." *People v. McDonald*, 405 Ill. App. 3d 131, 138, 937 N.E.2d 778, 785 (2010). Defendant's allegation is that the State did not disclose to the trial court that he did not commit the crime. However, defendant was already aware of what he contends the state hid. We question how, based on his own allegation he was "manipulating the system in an effort to protect his cousin" when he pled guilty, defendant can demonstrate diligence in prosecuting his claim. If he was indeed "manipulating the system," he was doing so, by his own admission, with

knowledge of the factual basis for the instant petition. See *People v. Davis*, 2012 IL App (4th) 110305, ¶ 20, 966 N.E.2d 570 ("A petitioner must file the petition without undue delay after becoming aware of the factual basis for a petition.").

¶ 18 Defendant asserts once he decided to enter the plea of guilty, he was under duress because he feared retribution if he revealed he was entering the plea to protect his cousin.

However, we note the following exchange between the court and defendant during defendant's plea hearing.

"THE COURT: Mr. Hearn, other than for the plea agreement, any force been applied, any threats or promises been made to cause you to enter into this negotiated plea?

[DEFENDANT]: No."

- ¶ 19 Defendant filed his petition six years after the expiration of the statute of limitations and has offered no basis why he could not have filed his claim within the two-year period.
- ¶ 20 C. Merits of Defendant's Petition
- Even if defendant's petition was timely, it fails on the merits. First, defendant's proffered evidence does not demand his innocence. Defendant admits he was present in the house where the cocaine was found and explains he was "smoking crack." This and, as OSAD points out, his presence in a "crack house" could support a finding defendant was in possession of the cocaine found during the search. See *People v. Whalen*, 145 Ill. App. 3d 125, 131, 495 N.E.2d 122, 127 (1986) ("the rule that possession must be exclusive does not mean that possession may not be joint"). Defendant does not contest he was found in possession of \$1,800

cash. This could support an inference of his intent to deliver the cocaine. See *People v*. *Robinson*, 167 III. 2d 397, 408, 657 N.E.2d 1020, 1026 (1995) (circumstantial evidence of intent can include possession of large amounts of cash). Evidence that Knighton sold cocaine to the confidential informant does not preclude a conclusion defendant possessed cocaine with the intent to manufacture or deliver.

- As discussed above, defendant cannot show due diligence in pursuing his claim.

 Defendant does not assert he pleaded guilty without knowledge his cousin was the guilty party.

 Rather, he asserts he pleaded guilty to protect his cousin and "manipulate" the system. Thus, defendant has not offered new evidence not available to him when he pleaded guilty in December 2003.
- ¶ 23 III. CONCLUSION
- ¶ 24 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.
- ¶ 25 Affirmed.